

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

11 WILBUR LANN PITTMAN,

12 Petitioner,

13 v.
14 GARY SANDOR, et al.,

15 Respondents.

Civil No. 10-0626 IEG (JMA)

**ORDER DISMISSING CASE
WITHOUT PREJUDICE AND WITH
LEAVE TO AMEND**

16 Petitioner, a state prisoner proceeding pro se, has filed a Petition for Writ of Habeas
17 Corpus pursuant to 28 U.S.C. § 2254.

FAILURE TO SATISFY FILING FEE REQUIREMENT

18 Petitioner has not paid the \$5.00 filing fee and has not filed a motion to proceed in forma
19 pauperis. This Court cannot proceed until Petitioner has either paid the \$5.00 filing fee or
20 qualified to proceed in forma pauperis. *See* Rule 3(a), 28 U.S.C. foll. § 2254.

VENUE

21 A petition for writ of habeas corpus may be filed in the United States District Court of
22 either the judicial district in which the petitioner is presently confined or the judicial district in
23 which he was convicted and sentenced. *See* 28 U.S.C. § 2241(d); *Braden v. 30th Judicial*
24 *Circuit Court*, 410 U.S. 484, 497 (1973). Petitioner is presently confined at California
25 Rehabilitation Center in Norco, California, which is within the jurisdictional boundaries of the
26 United States District Court for the Central District of California, Eastern Division. *See*
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1 28 U.S.C. § 84(c)(1). It is not clear from the petition where the state court conviction Petitioner
 2 seeks to challenge occurred. *See id.* Thus, this Court may not have jurisdiction over the matter.
 3 If Petitioner wishes to proceed with this case, he must inform the Court where the state court
 4 conviction he seeks to challenge took place.

5 **FAILURE TO USE PROPER FORM**

6 Additionally, a Petition for Writ of Habeas Corpus must be submitted in accordance with
 7 the Local Rules of the United States District Court for the Southern District of California. *See*
 8 Rule 2(c), 28 U.S.C. foll. § 2254. In order to comply with the Local Rules, the petition must be
 9 submitted upon a court-approved form and in accordance with the instructions approved by the
 10 Court. Presently, Petitioner has submitted an application for writ of habeas corpus on a non-
 11 approved form.

12 **FAILURE TO ALLEGE EXHAUSTION OF STATE JUDICIAL REMEDIES**

13 Further, habeas petitioners who wish to challenge either their state court conviction or the
 14 length of their confinement in state prison, must first exhaust state judicial remedies. 28 U.S.C.
 15 § 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987). Ordinarily, to satisfy the
 16 exhaustion requirement, a petitioner must “fairly present[] his federal claim to the highest state
 17 court with jurisdiction to consider it . . . or . . . demonstrate[] that no state remedy remains
 18 available. *Johnson v. Zenon*, 88 F.3d 828, 829 (9th Cir. 1996) (citing *Picard v. Connor*, 404
 19 U.S. 270, 275 (1971); *Anderson v. Harless*, 459 U.S. 4, 6 (1982)). Moreover, to properly
 20 exhaust state court remedies a petitioner must allege, in state court, how one or more of his or
 21 her federal rights have been violated. For example, “[i]f a habeas petitioner wishes to claim that
 22 an evidentiary ruling at a state court trial denied him [or her] the due process of law guaranteed
 23 by the Fourteenth Amendment, he [or she] must say so, not only in federal court, but in state
 24 court.” *See Duncan v. Henry*, 513 U.S. 364, 365-66 (1995)(emphasis added).

25 Nowhere on the Petition does Petitioner allege that he raised his claims in the California
 26 Supreme Court. In fact, he specifically indicates he did not seek review in the California
 27 Supreme Court. (*See* Pet. at 3-10.) If Petitioner has raised his claims in the California Supreme
 28 Court he must so specify.

1 Further, the Court cautions Petitioner that under the Antiterrorism and Effective Death
2 Penalty Act of 1996 (AEDPA) a one-year period of limitation shall apply to a petition for a writ
3 of habeas corpus by a person in custody pursuant to the judgment of a State court. The
4 limitation period shall run from the latest of:

7 (B) the date on which the impediment to filing an application
8 created by State action in violation of the Constitution or laws of the
United States is removed, if the applicant was prevented from filing
by such State action;

10 (C) the date on which the constitutional right asserted was
11 initially recognized by the Supreme Court, if the right has been
newly recognized by the Supreme Court and made retroactively
applicable to cases on collateral review; or

12 (D) the date on which the factual predicate of the claim or
13 claims presented could have been discovered through the exercise
of due diligence.

¹⁴ 28 U.S.C.A. § 2244(d)(1)(A)-(D) (West Supp. 2002).

15 The statute of limitations does not run while a properly filed state habeas corpus petition
16 is pending. 28 U.S.C. § 2244(d)(2); *see Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999).
17 *But see Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’
18 when its delivery and acceptance [by the appropriate court officer for placement into the record]
19 are in compliance with the applicable laws and rules governing filings.”). However, absent some
20 other basis for tolling, the statute of limitations does run while a federal habeas petition is
21 pending. *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001).

22 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a
23 habeas petition “[i]f it plainly appears from the face of the petition and any exhibits annexed to
24 it that the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll.
25 § 2254. Here, it appears plain from the Petition that Petitioner is not presently entitled to federal
26 habeas relief because he has not alleged exhaustion of state court remedies.

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FAILURE TO STATE A COGNIZABLE FEDERAL CLAIM

2 Additionally, in accordance with Rule 4 of the rules governing § 2254 cases, Petitioner
3 has failed to allege that his state court conviction or sentence violates the Constitution of the
4 United States.

5 Title 28, United States Code, § 2254(a), sets forth the following scope of review for
6 federal habeas corpus claims:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

10 28 U.S.C. § 2254(a) (emphasis added). *See Hernandez v. Ylst*, 930 F.2d 714, 719 (9th Cir.
11 1991); *Mannhalt v. Reed*, 847 F.2d 576, 579 (9th Cir. 1988); *Kealohapauole v. Shimoda*, 800
12 F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal habeas corpus claim
13 under § 2254, a state prisoner must allege both that he is in custody pursuant to a “judgment of
14 a State court,” and that he is in custody in “violation of the Constitution or laws or treaties of the

15 United States.” *See* 28 U.S.C. § 2254(a). Petitioner appears to be complaining about how the
16 California Department of Corrections is calculating his sentence. (*See* Pet. at 2-9, 12-27.) In
17 no way does Petitioner claim he is “in custody in violation of the Constitution or laws or treaties
18 of the United States.” 28 U.S.C. § 2254.

CONCLUSION

20 For all the foregoing reasons, the Court **DISMISSES** this case without prejudice and with
21 leave to amend. If Petitioner wishes to proceed with this case, he must, **no later than June 1,**
22 **2010**: (1) pay the \$5.00 filing fee **OR** submit adequate proof of his inability to pay the fee; **AND**
23 (2) file a First Amended Petition which cures the pleading deficiencies outlined in this Order.

24 THE CLERK OF COURT IS DIRECTED TO MAIL PETITIONER A BLANK MOTION

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1 **TO PROCEED IN FORMA PAUPERIS AND A BLANK FIRST AMENDED PETITION**
2 **FORM TOGETHER WITH A COPY OF THIS ORDER.**

3 **IT IS SO ORDERED.**

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5 **DATED: March 30, 2010**

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IRMA E. GONZALEZ, Chief Judge
United States District Court

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